SUPREME COURT, U. S.
FEB 22 1974
MICHAEL RODAK, JR., CLERK

No. 73-747

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHARLES TRAVIS AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

PHILIP R. MONAHAN,
Attorney,

Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	7
Conclusion	15
Appendix	16

CITATIONS

Cases:

Barnes v. *United States*, 412 U.S. 837	15
Benton v. *Maryland*, 395 U.S. 784	15
Blockburger v. *United States*, 284 U.S. 299	14
Costello v. *United States*, 350 U.S. 359	8
Gore v. *United States*, 357 U.S. 386	14
Pereira v. *United States*, 347 U.S. 1	14
United States v. *Beacon Brass Co.*, 344 U.S. 43	14
United States v. *Erdos*, 474 F. 2d 157, certiorari denied, October 9, 1973 (No. 72-1386)	9-10
United States v. *Estepa*, 471 F. 2d 1132	7
United States v. *Romano*, 382 U.S. 136	15
United States v. *Umans*, 368 F. 2d 725, certiorari dismissed, 389 U.S. 80	14

Statutes: Page

18 U.S.C. 201 ..... 3, 16-17
18 U.S.C. 201(b) 14
18 U.S.C. 201(b)(1) 14
18 U.S.C. 201(b)(2) 14
18 U.S.C. 201(c) 3, 14, 16
18 U.S.C. 201(c)(2) 2, 3, 13, 14, 16
18 U.S.C. 201(c)(3) 4, 16
18 U.S.C. 201(f) 14
18 U.S.C. 201(g) 2, 3, 4, 13, 14, 16
18 U.S.C. 3238 8
28 U.S.C. 1732 10

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-747

CHARLES TRAVIS AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court denying a motion for judgment of acquittal or in the alternative for a new trial (Pet. App. A1-A8) is not reported. The court of appeals affirmed petitioner's conviction without opinion (Pet. App. A14-A15).

JURISDICTION

The judgment of the court of appeals (Pet. App. A14-A15) was entered on June 27, 1973. A petition

for rehearing with suggestion for rehearing *en banc* was denied on October 11, 1973 (Pet. App. A16). The petition for a writ of certiorari was filed on November 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether review should be granted to determine if the grand jury may have been misled into believing it had heard eyewitness evidence of petitioner's offenses.

2. Whether the Western District of Tennessee (where petitioner was arrested) was the proper venue of his trial for offenses committed abroad.

3. Whether an exhibit was properly received in evidence as a company record made in the regular course of business.

4. Whether the trial court properly refused to strike certain testimony as hearsay.

5. Whether 18 U.S.C. 201(c)(2) (prohibiting the corrupt acceptance of money by a public official for being influenced to commit a fraud on the United States) and 18 U.S.C. 201(g) (prohibiting the acceptance of money by a public official for or because of an official act performed by him) define distinct, separately punishable offenses though the same transfer of money is involved.

STATUTE INVOLVED

The pertinent provisions of 18 U.S.C. 201 appear in the Appendix, *infra.*

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on five counts (the first four counts of one indictment [1] and a separate one-count indictment) charging him with soliciting and accepting bribes in connection with his duties as a public official, in violation of various provisions of 18 U.S.C. 201(c) and (g) (Appendix, *infra*) (Pet. App. A1, A17-A21, A25-A26).[2] On August 24, 1972, he was

---

[1] Three other counts of this indictment (Pet. App. A21-A24) were dismissed and are no longer involved.

[2] Each charge related to the purchase by petitioner from a Japanese corporation of supplies for the naval base at which he was employed. Count One of the first indictment charged that on October 6, 1969, he corruptly accepted 3,500,000 yen from the company, thereby being influenced to commit a fraud on the United States (in violation of 18 U.S.C. 201(c)(2)). The fraud charged, a "kickback" scheme, involved the submission by petitioner to the company of purchase orders for goods showing higher prices than the company actually charged, payment for the goods with government checks drawn in the inflated amounts, and the refunding to petitioner for his own use of the differences between the true and the stated prices (Pet. App. A17-A18). Count Three charged that on November 1, 1969, petitioner corruptly solicited from the company, pursuant to the same scheme, a second payment, in the amount of $17,500 (in violation of the same statutory provision) (Pet. App. A19-A20). Counts Two and Four were

sentenced to two years' imprisonment on each of the four counts of the first indictment, to run concurrently, and to one year on the second indictment, to run consecutively to the two-year term. He was in addition fined $1,500 on the second indictment (Pet. App. A9-A13). The court of appeals affirmed (Pet. App. A14-A15).

Petitioner, a civilian, was the Recreation Division Officer of the United States Naval Station at Sangley Point, Republic of the Philippines. Between August 5 and mid-October 1969 he submitted nine purchase orders to a California affiliate of the Kyosho Corporation ("Kyosho") of Tokyo, Japan, for supplies for the facility. Each order listed the price of the ordered item at a figure substantially higher than Kyosho's actual selling price. The checks with which petitioner paid for the merchandise, all drawn on a government account, were in the inflated amounts shown in the orders. The differences between the true and the stated prices aggregated $27,607 (Tr. 41-47, 60-75, 81-83, 87-132, 139-156, 165-184, 212-

---

based on the same transactions, respectively, as Counts One and Three, but charged that the acceptance (of the 3,500,000 yen) and the solicitation (of the $17,500) were "because of official acts by" petitioner (in violation of 18 U.S.C. 201(g)) (Pet. App. A18-A19, A20-A21). See pp. 13-15, *infra*. The single-count second indictment charged that petitioner's acceptance of the 3,500,000 yen was in return for being induced to do acts violative of his official duties, *viz.*, the duties to require competitive bidding and not pay for ordered goods before delivery (in violation of 18 U.S.C. 201(c)(3)) (Pet. App. A25-A26).

213, 216, 251-255, 288-290, 370, 376, 413-419, 477-478, 510, 545-546).[3]

On September 17, 1969, petitioner appeared at the Tokyo office of Kyosho and, in payment of the first two or three of the ordered items, hand-delivered three checks to Hisashi Suzuki, the company president. These checks totaled $21,300, exceeding by $6,447 Kyosho's normal prices for the merchandise (Tr. 43, 46-47, 73, 100-101, 104-105, 216-219, 224-225). Petitioner told Suzuki he planned to use the difference between the total amount of the checks and the cost of the goods to buy playground equipment for the naval station's kindergarten. He declined a suggestion by Suzuki that he buy the equipment from or through Kyosho and apply the excess reflected in the checks toward the purchases, stating that he wanted the difference refunded, in cash. Suzuki agreed to comply with petitioner's request, but said petitioner would have to wait till the checks he had brought had cleared the bank. Petitioner said he would be back later to get the money (Tr. 75-79, 224-228). At petitioner's request, false invoices, showing the prices of the ordered goods to be in the amounts of the checks, were prepared at Suzuki's direction and given to petitioner (Tr. 65-68, 72-75, 94-99, 239-242, 370).

Thereafter, sometime prior to October 6, 1969, Suzuki prepared for petitioner's signature a typed

---

[3] "Tr." refers to the partial transcript of the trial on file in the Clerk's office.

acknowledgement of the receipt from Kyosho of 3,500,000 yen,[4] as a refund of moneys paid to the company in connection with purchases which were itemized, and left the document with his wife (the person in charge at Kyosho in Suzuki's absence) for petitioner to sign when he called for the money (Tr. 201-203, 246-250, 380-386, 496, 503, 535-536, 542-543). The receipt, an official business record of the company, bearing petitioner's signature[5] and the handwritten date October 6, 1969, was thereafter returned by Mrs. Suzuki to her husband (Tr. 201-203, 247-250, 380-381, 496-497, 537-538, 542, 1265, 1426).

On November 1, 1969, petitioner again called on Suzuki at his Tokyo office and delivered several additional checks to him (Tr. 120-121, 141-142, 176-177, 254-256). Counting the overpayments reflected in them, the overage that had accumulated since the October 6 refund amounted to $17,500 (Tr. 257). Petitioner told Suzuki that he wanted that sum refunded, as soon as possible, in American currency.

---

[4] This sum, the equivalent of $9,900 in American money, included, in addition to the $6,447 excess reflected in the checks petitioner had delivered on September 17, the difference between the actual and the stated prices of an additional purchase, the order for which had been received by Kyosho prior to petitioner's visit, but the check in payment for which was not received by the company till later (Tr. 106-111, 116-117, 247, 249-250, 387-388, 406-407, 514).

[5] The genuineness of the signature was attested both by petitioner's assistant at the naval station and by an expert questioned documents examiner (Tr. 1265, 1426).

Because Kyosho maintained no dollar account in Japan, it was agreed that Satoshi Miyazaki, a Kyosho employee, would be sent to Guam to draw the money from a bank on that island in which the company had such an account and that petitioner would receive the money there from Miyazaki (Tr. 256-257). Miyazaki met petitioner in Guam on November 3, 1969, drew $17,500 in cash from the account, and, after petitioner had receipted for it, gave him the money (Tr. 258-262, 1191-1202).

ARGUMENT

1. In *United States* v. *Estepa*, 471 F. 2d 1132 (C.A. 2), a conviction was reversed and the indictment ordered dismissed because the grand jury had been misled into thinking it was hearing eyewitness evidence whereas in fact the testimony presented had been hearsay. Suggesting that it "may be" that the grand jurors were similarly misled in this case, petitioner, in reliance on *Estepa*, contends that review should be granted to determine whether such deception occurred and, if so, whether reversal is warranted (Pet. 2, 5-7). The contention has no merit because the suggestion on which it is based is incorrect. The transcript of the grand jury proceedings that resulted in the principal (*i.e.*, the multicount) indictment, a copy of which was appended to the government's brief in the court of appeals and is being

lodged herewith,[6] shows that there was no such deception. It appears from the transcript that the witnesses who testified were two agents of the Naval Investigative Service, whose investigations led to the decision to prosecute, and that the hearsay nature of their principal testimony is apparent on the face of the record.[7] It is, of course, not disputed that an indictment is valid though based entirely on hearsay. Cf. *Costello* v. *United States*, 350 U.S. 359.

2. There is no merit to petitioner's contention that he should have been tried in the Northern District of California (Pet. 3, 7-8). 18 U.S.C. 3238 provides that the trial of all offenses committed out of the jurisdiction of any particular State or district shall be in the district in which the offender "is arrested or is first brought." It is undisputed that petitioner was arrested in the Western District of Tennessee.[8] That district was consequently the appropriate venue. It is immaterial that the aircraft by which petitioner

---

[6] The transcript was furnished to petitioner before trial (Pet. App. A1).

[7] For example, the testimony of Agent Yamamoto, who conducted the investigation in Japan, consisted in the main of his reporting to the grand jury what he had learned from the Japanese witnesses in his interviews with them and the reading of a written statement furnished him by Suzuki (grand jury transcript, pp. 25-44).

[8] This was also the district of petitioner's residence, as the district court noted, and he produced a number of character witnesses from the area (Pet. App. A7). Thus from the standpoint of convenience to the defense it is evident that no other venue would have been as suitable.

returned to the United States from Japan first landed in the Northern District of California. The record shows that petitioner was not in custody at the time and that his freedom of movement had not theretofore been substantially interfered with.[9] The "first brought" provision of Section 3238 consequently has no relevance. Cf. *United States* v. *Erdos*, 474 F. 2d

---

[9] Petitioner, who had changed his employment from the Sangley Point Naval Station to a naval facility in Yokohama, Japan, in late October of 1969, was relieved of his duties at the latter station as of December 31, 1969 (Tr. 703). From then until his departure for the United States in mid-January 1970, he resided with his family, with no restrictions on his freedom, at the Navy Exchange Hotel in Yokohama (Tr. 995-997). His flight to the United States was made at his own expense, in a commercial aircraft that had been chartered by the military authorities to transport military personnel (Tr. 998-999, 1003-1004). After being escorted to the point of departure by a civilian official of the Yokohama facility, to whom he was required to surrender his naval identification card before embarking, he boarded and selected his own seat on the plane (Tr. 999-1002). Prior to takeoff he and two other passengers (military personnel) stood and identified themselves when their names were called by a military policeman (Tr. 992-993, 1002-1003). Following debarkation at the California air terminal and the inspection of his baggage by the customs authorities, petitioner was strip-searched by or under the direction of some persons whom he "took" to be military investigators but whose identity does not appear (Tr. 993-994, 1005-1006). His freedom was not otherwise restricted. He then proceeded unescorted on his way (Tr. 1005-1006). Petitioner's statement that he was subjected to a custodial interview and search at the California terminal by a special agent of the Naval Investigative Service (Pet. 8) is not supported by the record otherwise than as indicated.

157, 160-161 (C.A. 4), certiorari denied, October 9, 1973 (No. 72-1386).

3. Petitioner's contention that Government Exhibit 33 was erroneously received in evidence (Pet. 3, 11-12) is answered in the district court's opinion (at Pet. App. A4-A5), on which, as to this point, we principally rely. The exhibit, an exact reproduction of a page from a Kyosho ledger book showing all the company's transactions with petitioner (Tr. 50-59), was admissible under 28 U.S.C. 1732 as a record made in the regular course of business. Contrary to petitioner's statement that he was indicted for offenses involving a California corporation,[10] the indictments charged and the evidence showed the corrupt acceptance of money by petitioner from the Kyosho Corporation of "Tokyo, Japan" (Pet. App. A17, A19, A25). Petitioner's statement that the exhibit was prepared for use at the trial of this case (Pet. 11) likewise has no record support.

4. Suzuki initially testified that he was at his company's Tokyo office on October 6, 1969, when various transactions between petitioner and the company, described by him, occurred (Tr. 242-250, 380-387, 409). He testified, for example, that petitioner delivered to him on that day a number of purchase orders and some additional checks; that additional invoices,

[10] There was a California company called the Kyosho Corporation, an affiliate of the Tokyo firm (Tr. 288-290, 413-419, 477-478), to which the purchase orders were addressed and the checks were made payable (Tr. 545-546). Except as noted, however, the affiliate figured little in the evidence.

similar to those petitioner had been supplied on his September 17 visit, were prepared at petitioner's request; and that he instructed Mrs. Suzuki to give petitioner the money he had requested, after securing a receipt for it from him (Tr. 242-250). During his redirect examination by government counsel, Suzuki testified that his memory had been refreshed during an overnight recess by a pre-trial statement he had given and that he then recalled that he had not been in Tokyo on the day in question (Tr. 495-496, 533-534). He then explained, clarifying his earlier testimony with respect to the October 6 receipt, that he had typed the receipt on a day prior to the 6th, leaving the date blank, and that Mrs. Suzuki, with whom he had left the receipt, had returned it to him, executed, later (Tr. 496-497, 535-543; cf. Tr. 247-249).[11]

---

[11] Suzuki at no time testified that he personally witnessed the payment to petitioner of the 3,500,000 yen referred to in the receipt. Moreover, it appears that Suzuki never intentionally testified that petitioner signed the receipt in his presence. The witness did answer "Yes, sir" to a compound question, asked him by petitioner's counsel, as to whether the receipt had been executed in his presence *and* if he had typed it (Tr. 380-381). However, following his later acknowledgement that he had been mistaken in his testimony that he was in his office on October 6, Suzuki denied, under cross-examination by petitioner's counsel, that he had previously testified that petitioner had signed the receipt in his presence, while reaffirming that he had typed the document (Tr. 535-543). Thus it is fair to infer that Suzuki (whose English was poor and who occasionally needed an interpreter, see Pet. App. A4) meant his aforementioned affirmative answer to apply only to

Immediately after Suzuki's acknowledgement that he had been mistaken as to his whereabouts on October 6, petitioner's counsel, at an extended bench conference, moved for a mistrial on the ground that as a result of the acknowledgement there was a fatal variance between the indictment and the proof, but he made no request that the witness' testimony as to the events of the 6th be stricken as hearsay (Tr. 497-502). The motion for a mistrial was denied (Tr. 500), and petitioner's counsel proceeded to cross-examine Suzuki at length about his change in testimony and about the events as the witness then remembered them (Tr. 522-543). At the close of the government's case in chief, the defense moved that all of Suzuki's testimony relating to the 6th be stricken and that the jury be instructed to disregard it. Petitioner contends that the denial of this motion was error (Pet. 3, 8-11).

Aside, however, from the lateness of the motion, its denial was not improper. A substantial part of the testimony in question related to the delivery by petitioner, on the pertinent date, of various checks and purchase orders, the receipt of which by the company was reflected in the company's records, including the orders themselves and the aforementioned Exhibit 33. Suzuki, as president of the company, had great familiarity with these records and a major part of his overall testimony consisted of his attempts to clarify

---

the second part of the question—the inquiry if he had typed the receipt.

for the court and jury their significance in the complex dealings between the company and petitioner. It was a reasonable exercise of discretion, therefore, for the court to permit Suzuki's testimony to stand, qualified by the witness' acknowledgement that he had been in error in the respect mentioned.

In any event, since it was forcefully brought home to the jury, through exhaustive cross-examination, that Suzuki had not personally witnessed either the payment of the 3,500,000 yen to petitioner or petitioner's signing of the receipt therefor—the principal incriminating incidents claimed by the government to have occurred on the day in question—there is, we submit, no substantial basis for a claim of prejudice.

5. Counts One and Two of the principal indictment, contrary to petitioner's final contention (Pet. 3, 12-13), did not charge the same offense. While both counts are based on the same transaction (the receipt by petitioner of the 3,500,000-yen payment), the first count charged that petitioner "corruptly" accepted the money, thereby "being influenced to commit a fraud against the United States" (in violation of 18 U.S.C. 201(c)(2)), whereas the second count charged that the acceptance of the money was "because of official acts by" petitioner (in violation of 18 U.S.C. 201(g)) (Pet. App. A17-A19; see Appendix, *infra*). Proof of the scheme to defraud the United States was necessary under the first count but not under the second; conversely, proof that the

money was in payment for official acts by petitioner was required under the second count but not under the first. The counts, therefore, charged distinct offenses.[12] It is well settled that where the same act or transaction violates distinct statutory provisions, the test to be applied to determine whether distinct offenses are committed is whether each provision requires proof of a fact that the other does not. *Gore* v. *United States*, 357 U.S. 386; *Pereira* v. *United States*, 347 U.S. 1, 9; *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45; *Blockburger* v. *United States*, 284 U.S. 299, 304. In any event, since the sentences imposed on the two counts are concurrent (Pet. App.

---

[12] *United States* v. *Umans*, 368 F. 2d 725 (C.A. 2), certiorari dismissed, 389 U.S. 80, relied on by petitioner, is distinguishable. That case held that the offense defined by 18 U.S.C. 201(f) is a lesser offense included in that defined by 18 U.S.C. 201(b) (368 F. 2d at 730). Sections 201(f) and 201(b) are analogous to Sections 201(g) and 201(c) (involved in this case), the first two provisions applying to the giver, the second two to the receiver, of the proscribed payments (see Pet. iv-vi). However, the particular provision of Section 201(b) involved in *Umans* was paragraph (1) of the three paragraphs contained therein, prohibiting the giving of the payment to the official with intent "to influence any official act." Thus the holding of *Umans* was that paying an official "for or because of" an official act (Section 201(f)) is not a distinct offense from that of paying him "to influence" the act (Section 201(b)(1))—clearly a reasonable determination. Since *Umans* did not involve paragraph (2) of the three paragraphs contained in Section 201(b) (the analog of Section 201(c)(2), involved here), prohibiting paying an official with intent to influence him to commit a fraud on the United States, the decision can be reconciled with the decision in this case.

A9-A10), there is no need for the Court to consider this contention. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16; *United States* v. *Romano*, 382 U.S. 136, 138; cf. *Benton* v. *Maryland*, 395 U.S. 784, 791.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

FEBRUARY 1974.

APPENDIX

18 U.S.C. 201 provides in relevant part:

* * * * *

(c) Whoever, being a public official * * *, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty * * *

* * * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * * *

(g) Whoever, being a public official, * * * otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him * * *

* * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 532704 188